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90-219

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RIVERVIEW INVESTMENTS, INC. AND
MELVIN F. SMITH,

Petitioners,

v.

OTTAWA COMMUNITY IMPROVEMENT CORPORATION, VILLAGE OF OTTAWA, CHARLES BRUSKOTTER, JAMES BECKMAN, RICHARD EDELBROCK, THOMAS DOEPKER, DAVID LAUDICK, RICHARD LAUDICK, LOUIS MACKE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a petitioner, in order to establish a conspiracy under *Monsanto Company* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), must exclude the possibility of independent action, rather than offer evidence which tends to exclude such a conclusion.

STATEMENT OF INTERESTED PARTIES

All parent companies, subsidiaries and affiliates of Petitioners are named in the caption. There are no interested parties who have not been identified in the caption.

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RIVERVIEW INVESTMENTS, INC. AND
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OTTAWA COMMUNITY IMPROVEMENT
CORPORATION, VILLAGE OF OTTAWA, CHARLES
BRUSKOTTER, JAMES BECKMAN, RICHARD
EDELBROCK, THOMAS DOEPKER, DAVID LAUDICK,
RICHARD LAUDICK, LOUIS MACKE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Riverview Investments, Inc. and Melvin Smith, appellants in the action below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on March 27, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals filed on March 27, 1990, is reproduced in Appendix A. The Memorandum and Order of the United States District Court, filed on April 13, 1988, is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was filed on March 27, 1990. A petition for rehearing was filed on April 9, 1990, and denied on May 10, 1990. This petition was filed within 90 days of May 10, 1990. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

Sherman Act Section 1, 15 U.S.C. Section 1 (1975), which states:

> "Every contract, combination . . . or conspiracy in restraint of trade . . . is . . . illegal."

STATEMENT OF THE CASE

This case involves denial of industrial revenue bonds (IRBs) by the Ottawa Community Improvement Corporation (C.I.C.) for petitioners' development project.[1] Petitioner, Riverview Investments, Inc., is an Ohio corporation of which Petitioner Melvin F. Smith is President and sole shareholder. Petitioners are in the business of real estate development and sales within the Village of Ottawa, Ohio.

Mr. Smith was chairman of the Industrial Development Committee for the Ottawa Chamber of Commerce and had been a Director of the CIC. Petitioners thus were familiar with the development needs of the Village and the availability of IRBs for eligible projects. Petitioners decided to develop a piece of property in the Ottawa community for commercial uses; the project was to include a K-Mart, a food store and other commercial facilities. Because the market for conventional financing had dried up at that time, petitioners decided to seek IRBs for the K-Mart store.

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[1] The C.I.C. is a not for profit corporation that contracted with the Village pursuant to Ohio Revised Code Section 1724.10 to review requests for industrial revenue bonds. (Trp. 11). Absent C.I.C. approval, a municipality may not issue IRBs. See O.R.C. Section 165.03(c). (Trp. 14).

Riverview purchased for its commercial development a 7.89 acre tract of land on the outskirts of the Village on April 25, 1979, and an adjoining 5.069 acres on December 31, 1979. Part of this property was to be included in the development project for which IRBs were sought while the remainder was to be separately developed by petitioners.

After considerable time and expense, petitioners conceived, developed and promoted a project in which the subject property would be used for retail purposes. They entered into agreements with Chase Shopping Centers, Inc. whereby Riverview granted Chase the exclusive option to purchase over 10 acres to construct a retail facility with K-Mart Corporation as a tenant while petitioners developed the adjoining property. Chase elected to exercise the option on the condition that the C.I.C. approve the sale of IRBs and that arrangements for the sale of the bonds be made. Zappala & Company, an investment banking firm, made a commitment to purchase up to $1,950,000.00 in IRBs when issued by the C.I.C. Thus, petitioners needed only to obtain IRBs for the development of their property to be able to consummate their agreements with Chase.

When requested to consider an application for IRBs, the C.I.C. is obliged to consider the proposed development project in light of the eight specific criteria set out in the Agreement and Plan adopted by Village Ordinance 1014. Those requirements are:

1. Creates and preserves jobs and employment opportunities in the Municipality and the State of Ohio.
2. Improves the economic welfare of the people of the Municipality and the State of Ohio.
3. Encourages and causes the maintenance, location, relocation, expansion, modernization and equipment of sites, buildings, structures and appurtenant facilities for industrial, commercial distribution and research activities within the Municipality and thereby preserves, maintains or creates addi-

tional opportunities for employment within the Municipality.

4. Maintains and increases the tax valuation of property within the Municipality in order that tax revenues may be available to provide services for the preservation of public peace, health, safety and general welfare of the Municipality.
5. Is consistent with social, economic and geographic factors present in the Municipality.
6. Is not inconsistent with job needs and skills present in the Municipality.
7. Is not inconsistent with environmental factors present in the Municipality.
8. Is in accordance with its applicable planning and zoning.

Petitioners, aware of the role of the C.I.C., designed their development project so as to meet all of the requirements for issuance of IRBs.

On April 3, 1980, a presentation was made to the C.I.C. so as to obtain certification that petitioners' development project was eligible for IRBs. Respondent Beckman, a member of the C.I.C., acknowledged that Smith had advised the C.I.C. of his personal involvement in the project; Beckman stated that "it was his [Melvin Smith's] proposal." In fact, Beckman asked Smith to resign from the C.I.C. because of his involvement in the project. Even though there was no opposition present, respondents refused to vote on the application and tabled the matter, without giving any reasons.

On April 16, 1980, the C.I.C. again considered the application for IRBs for petitioners' development project. This time the respondents voted, deciding not to certify the project, but without giving any reasons.

On August 8, 1980, the C.I.C. met to reconsider petitioners' development project but, again, the request for bonds

was rejected. Petitioners were obliged to refund money paid by Chase and the agreements were vitiated.

In the course of the C.I.C. meetings, respondents never gave any reason as to why they were refusing to certify petitioners' development project. In affidavits submitted in support of their motion for summary judgment and later put in evidence at trial, respondents articulated *post hoc* rationalizations for their actions. They all refer to downtown businesses being forced to close, downtown jobs being lost, and the lessening of downtown property values. However, not a single C.I.C. member could identify any particular store that they believed would have been forced to close or jobs that would have been lost.

Since a number of the respondents own businesses and properties in the downtown district, and since the bonds were denied because of the potential impact on just such businesses and properties as the C.I.C. members owned, petitioners alleged that they were deprived of the most fundamental due process right, a fair and impartial tribunal, and that the respondents' actions were in violation of the antitrust laws.

Petitioners filed a complaint seeking damages under the Civil Rights Act of 1967, 42 U.S.C. Section 1983, and the federal antitrust laws, 15 U.S.C. Section 1, *et seq.* The trial court initially granted summary judgment on behalf of the respondents and dismissed the complaint. Petitioners appealed that decision and the Sixth Circuit Court of Appeals held that while petitioners did not have a viable claim under Section 1983, they did have a cause of action under the antitrust laws and remanded the case for a determination of the applicability of state action immunity. *Riverview Investments, Inc.* v. *Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir. 1985), amended on denial of a rehearing and rehearing en banc, 774 F.2d 162.

On remand, an evidentiary hearing as to the applicability of state action immunity was held on November 18, 1986. On January 20, 1987, the Trial Court entered its findings of fact and conclusions of law and found that the C.I.C. was a

private non-municipal body not entitled to state action immunity.

The case was then tried to a jury commencing on February 11, 1987. On February 20, 1987, the jury returned a $350,000.00 verdict for the petitioners. The court then entered a judgment for petitioners in the amount of $1,050,000.00 pursuant to 15 U.S.C. Section 15.

Respondents challenged that verdict asking for a judgment notwithstanding the verdict, and in the alternative, for a new trial. The trial court granted respondent's motion solely on the grounds that petitioners had not submitted sufficient evidence for the jury to find a conspiracy. Petitioner filed their notice of appeal from that decision on March 26, 1988. On March 27, 1990 the Sixth Circuit confirmed the District Court's grant of judgment n.o.v. for the reason that petitioners failed to provide any independent evidence tending to exclude the possibility of a conspiracy.

REASONS FOR GRANTING THE WRIT

I. Introduction.

The decision rendered in this matter on March 27, 1990, addressing the sufficiency of the evidence of conspiracy and upholding the judgment notwithstanding the verdict, imposes a substantial evidentiary burden on petitioners not imposed by the applicable precedents of this court. The jury's finding of a conspiracy among the respondents to protect existing businesses from competition should therefore be upheld.

The Court of Appeals approach makes proof of conspiracy by circumstantial evidence an almost insurmountable task, rendering anti-competitive conspiracies that restrain trade and interfere with free enterprise, as in the case at hand, more likely to occur and more difficult to prevent. The Court's position permits those with control of access to a market to collude to wield their power to protect existing businesses from new competition, thereby protecting prices and property values.

II. A new subtantial evidentiary burden has been created out of a mere analytical perspective.

In affirming the judgment notwithstanding the verdict, the Sixth Circuit focused on the standards for inferring a conspiracy developed by this court in *Monsanto Company* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Petitioners believe that a writ of certiorari is necessary because the Sixth Circuit took the analytical approaches of *Monsanto* and *Matsushita*, requiring a court to look for motive and to see whether the evidence tends to exclude the possibility of independent action, and turned them into a new substantive burden that somehow must be proven with substantial evidence distinct from the evidence of conspiracy.

In *Monsanto*, the trial court permitted the jury to infer a conspiracy solely on the basis of evidence of distributor com-

plaints to the manufacturers and termination of the errant distributor. This Court required more:

> "There must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a common scheme designed to achieve an unlawful objective." 465 U.S. at 768.

Even so, the Court affirmed the conspiracy verdict with little evidence beyond the complaints, allowing circumstantial evidence to be used to establish the conspiracy. First, the manufacturer had approached distributors and told them that if they did not maintain prices they would not receive adequate supplies. Second, a distributor's newsletter referred to Monsanto's policies and efforts to maintain prices. In spite of the ambiguity of this evidence, and the fact that there was strong contrary evidence, the case was properly submitted to the jury. 465 U.S. at 1765, 768 n. 14.

Matsushita involved a summary judgment for respondents charged with a predatory pricing scheme. The Court reasoned that:

> "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587.

The Court evaluated the alleged conspiracy in the existing factual context: the respondents "lacked any rational motive" to conspire. 475 U.S. at 587. Interpreting *Monsanto*, the Court stated that a petitioner:

> "must show that the inference of conspiracy is reasonable in light of the competing inferences of in-

dependent action or collusive action . . . ." 475 U.S. at 588.

Thus, a petitioner must present evidence that "tends to exclude the possibility of independent action," and show that the respondents had a "rational motive" to conspire. The Sixth Circuit panel faulted the petitioner's evidence by raising these standards ("*tends* to exclude" and "lacked *any* rational motive") to substantial burdens far beyond what was required by this Court. Here, in applying the judgment n.o.v. standard that "reasonable minds could not come to a different conclusion," the Sixth Circuit has found that the jurors who heard the evidence and considered the credibility of the witnesses were not reasonable.

A. The Sixth Circuit's decision misapplies *Monsanto* and ignores reasonable inferences drawn by the jury from plaintiffs' evidence.

Much of the problem with the Sixth Circuit's decision occurred because of its faulty analysis of what is required under *Monsanto*. The Appellate court has stated that evidence of parallelism, opportunity to conspire, and actions consistent with a conspiracy, "may be consistent with conspiratorial conduct but . . . is not sufficient to allow an inference of conspiracy absent some evidence which tends to exclude the possibility that conduct is independent." Therefore, to prove conspiracy, it is not enough to prove motive, opportunity, and acts consistent with a conspiracy. Absent a document signed by the respondents admitting conspiracy, what more can a petitioner possibly offer to prove a conspiracy by circumstantial evidence? The Sixth Circuit has elevated the requirement for evidence that "tends to exclude the possibility of independent action" to something separate and distinct from evidence of conspiracy and created a new, virtually insurmountable obstacle for petitioners.

In reviewing the evidence, the Court recognized that at least three C.I.C. members had personal economic motives to deny industrial revenue bonds to petitioners. The Court also noted that other C.I.C. members had "committed themselves to protecting existing businesses from competition." (Decision, App. at 18a). In spite of this, the Court concluded that "the presence of a motive to conspire based either on personal pecuniary interest of C.I.C. members or commitments made to local businessmen to protect them from competition does not 'tend to exclude the possibility of independent action' as required by *Monsanto.*" (Decision, App. at 19a-20a). However, the Court failed to recognize that to effectuate that motive to exclude competition, one vote standing alone would not be sufficient. If even one of the respondents had a motive to deny the bonds, he would need the assistance of the others to fulfill that goal and gain sufficient votes to defeat a motion to grant bonds. This created a motive to conspire and thus tends to exclude the possibility of independent action.

The Court considered petitioners' evidence of discussions between C.I.C. members and other businessmen, but concluded that this did not tend to exclude the possibility of independent action. (Decision, App. at 20a). This analysis, however, ignored the focus of petitioners' evidence of conspiracy: it was not simply that the respondents met with other businessmen, but that they privately met *among themselves* to discuss petitioners' development project outside the context of any C.I.C. meeting. The respondents admitted this in both their affidavits and depositions (all presented at trial). Combined with their convenient losses of memory as to the substance of their conversations, a jury could certainly consider this evidence as tending to exclude the possibility of independent action.

The court also recognized that the respondents focused on the impact of petitioners' development project on the downtown area of the community in deciding to deny industrial revenue bonds. Petitioners have consistently argued that a net impact analysis (comparing the number of jobs to

be created by petitioners' project with the number of jobs that allegedly would be lost to existing businesses) focusing on the downtown segment of the community is not permitted. This was supported by both expert testimony and testimony of a former member of the respondent C.I.C. present during the consideration of petitioners' development project. Both witnesses unequivocally stated that the criteria governing the respondents' consideration of applications for industrial revenue bonds did *not* permit this focus on potential injury to existing downtown business.[2] In spite of this evidence, the Court stated that "the criteria does allow the C.I.C. to consider the impact of new development on the entire municipal area, which includes downtown." (Decision, App. at 19a, footnote 7). Had the respondents considered the entire community, including the downtown area, this argument might have some credence. However, the record indicates that the respondents showed no concern for any aspect of the community except the supposed effect of petitioners' project on existing downtown businesses (and not even on other existing businesses elsewhere in the community).

Respondents' net impact analysis is even more suspect where, in spite of their supposed concern for the downtown, respondents could not offer a single example of a business they thought would be hurt or employment that would be lost. Thus, each one of the respondents decided to base his refusal to approve industrial revenue bonds for petitioners' project (1) using a net impact analysis that focused solely on the downtown area, where (2) this analysis was not permitted in the criteria that must be applied, and (3) with no evidence to support his position. Certainly, this is circumstantial evidence that tends to exclude the possibility of independent action. The Court's analysis was faulty because it refused to

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[2] The expert bond counsel specifically testified that the agreement and plan did not allow the C.I.C. to look at the net impact of a development project, nor did it authorize the C.I.C. to focus on whether building petitioners' property would hurt downtown. (Tr. 24-26, 36.)

permit a jury to infer a conspiracy, instead concluding that the *only* reasonable inference is that each of the respondents arrived at this approach on his own.

However, petitioners' evidence went beyond even this. Petitioners established that this net impact analysis, focusing solely on the downtown district and deciding to deny bonds in order to protect existing downtown businesses, not only was not permitted under the applicable criteria, and not only was it supported by no evidence, but it *had never been done before*. (Tr. 302) Several other development projects had sought bonds for development in the same area where petitioners' project was proposed. All those projects received bonds and not one involved a concern for the net impact on the downtown district. Frankly, it is not reasonable to assume that each one of these respondents thought up this net impact analysis on his own where it was outside the scope of the applicable criteria, was not supported by the evidence, and had never been done before. A jury, based on this evidence, could easily and reasonably conclude that the restraint of trade occurred because of a conspiracy among the respondents. This evidence "tends to exclude the possibility of independent action" and thus renders the jury's verdict reasonable.

By holding that all this evidence was inadequate to support a finding of conspiracy, the Sixth Circuit elevated "tends to exclude" to "absolutely forecloses" the possibility of independent action. This increased burden on plaintiffs in antitrust suits is contrary to the teachings of *Monsanto*, and clearly obstructs the public policy set forth in the Sherman Antitrust Act to favor competition and forbid protectionist conspiracies.

B. Petitioners' evidence allowed the jury to reasonably infer a unity of purpose and common design among defendants.

In *Monsanto*, the Court looked for a "unity of purpose or a common design and understanding, or a meeting of minds in

an unlawful arrangement." 465 U.S. at 764, quoting *American Tobacco Co.* v. *United States*, 328 U..S 781, 810 (1946). That the respondents here each used an identical approach never applied before, unsubstantiated by any facts, and not permitted under the C.I.C.'s criteria certainly creates an inference of common design and understanding. No formal agreement is necessary; the inference of conspiracy may be deduced from the respondents' actions. *American Tobacco*, supra, 328 U.S. at 809. By rejecting the sufficiency of this evidence, and demanding still more, the Court has thus elevated the "tends to exclude" analysis to a new substantive burden that is virtually insurmountable.

From the above discussion of the record and the Court's decision, there clearly was ample evidence from which a jury could reasonably infer a conspiracy rather than independent action. Apparently, the court believed that petitioner's evidence tending to exclude the possibility of independent action was not sufficient. Unfortunately, the Court never stated what more petitioners should have offered. Not only does the Sixth Circuit depart from the proper standard for granting a judgment n.o.v. [a court must consider the evidence "in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in favor . . ." (Decision, App. at 16a)], but it conflicts with its own earlier decision in *Beach* v. *Viking Sewing Machine Company, Inc.*, 784 F.2d 746, 750 (6th Cir. 1986), which held that a directed verdict was appropriate only where "[t]he record did not reflect *any* evidence of a concerted effort . . ." (emphasis supplied) and the evidence of legitimate conduct was negated only by "conclusory assertions."

Anti-competitive conduct that threatens and inhibits free enterprise, hurts consumers and protects existing businesses becomes virtually unassailable under the Sixth Circuit's standard. In treating this case as a purely evidentiary question, the Court raised an analytical focus (whether the evidence of conspiracy tends to exclude the possibility of independent action) to a substantial substantive burden making

proof of conspiracy by circumstantial evidence virtually impossible. This was never stated nor intended by this Court in *Monsanto*.[3] The judgment notwithstanding the verdict was improperly granted and affirmed; the jury's verdict should be reinstated.

III. The range of permissible inferences from petitioners' evidence was inexplicably limited, contrary to controlling precedents.

Not only is the Sixth Circuit's application of *Monsanto* faulty, but its analysis of the range of permissible inferences is also suspect. In *Matsushita* the court held that "lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence." 475 U.S. at 596. Here, the court recognized respondents' motive to conspire; some had their own businesses and properties to protect; others had previously committed to protect downtown businesses from new competition. (Decision, App. at 18a). It is thus not a question of lack of motive. Therefore, the permissible inferences that could be drawn from the evidence should not have been restricted, as the Court has done, but rather, the inferences the jury drew should have been permitted.

The respondents clearly had motives to join together to garner sufficient votes to deny industrial revenue bonds to petitioners. The Court thus improperly restricted the inferences that the jury could make. When you combine the

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[3] Recall that in *Monsanto*, the trial court had permitted the jury to find a conspiracy based solely on the existence of complaints from distributors to the manufacturer. This could be analogous to the motive evidence here (i.e., concern to protect downtown businesses, be they respondents' own or those of their friends). Just as other ambiguous evidence was sufficient in *Monsanto*, petitioners' additional evidence here, showing meetings among the respondents prior to their votes, no legal basis, no factual basis and that the approach had never been done before, likewise tends to exclude the possibility of independent action and thus renders the jury's finding of conspiracy reasonable.

range of inferences available with the standard of review for a judgment notwithstanding the verdict (to consider the evidence "in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inference in his favor . . ." (Decision, App. at 16a, citation omitted)), the Court's decision sustaining the judgment n.o.v. is clearly erroneous. ("The issue raised by a motion for a judgment n.o.v. is whether there is sufficient evidence to raise a question of fact for the jury . . . In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses, nor substitute its judgment for that of the jury"), and *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), cert. denied 424 U.S. 913 (1976), ("In determining whether judgment n.o.v. was proper the Court must view the evidence in the light most favorable to [the party] who secured the verdict, and a judgment n.o.v. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence").

By failing to address or accept the sufficiency of petitioners' evidence, and by limiting the inferences that could be reasonably drawn, the Court's decision directly conflicts with both *Monsanto* and *Matsushita*. Inexplicably, the Court has rejected the jury's verdict by narrowly circumscribing the available inferences where it should have permitted the jury to draw all reasonable inferences. The court below has distorted this court's holding in *Monsanto* and *Matsushita* and defied Congress' intendances for adopting the antitrust laws by turning the standard for proving conspiracies into an insurmountable obstacle while invading the province of the jury. This distortion of the law should be countermanded.

IV. Conclusion

The Sixth Circuit has erroneously affirmed a judgment notwithstanding the verdict by (1) misinterpreting *Monsanto* so as to impose a new substantive burden making proof of conspiracies in restraint of trade virtually impossible; and (2) restricting the permissible range of inferences contrary to *Matsushita* and Sixth Circuit precedents. A writ of certiorari should be issued to correct this grave error.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-3381/3399

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RIVERVIEW INVESTMENTS, INC. and MELVIN F. SMITH, *Plaintiffs-Appellants and Cross-Appellees,* v. OTTAWA COMMUNITY IMPROVEMENT CORPORATION, VILLAGE OF OTTAWA, CHARLES BRUSKOTTER, JAMES BECKMAN, RICHARD EDELBROCK, THOMAS DOEPKER, DAVID LAUDICK, RICHARD LAUDICK, LOUIS MACKE, *Defendants-Appellees and Cross-Appellants.*	ON APPEAL from the United States District Court for the Northern District of Ohio.

Decided and Filed March 27, 1990

Before: MERRITT, Chief Judge; KENNEDY, Circuit Judge; and McRAE, Senior District Judge.*

*Honorable Robert M. McRae, Jr., United States District Court for the Western District of Tennessee, sitting by designation.

KENNEDY, Circuit Judge. Riverview Investments, Inc. and its president Melvin Smith appeal the District Court's grant of judgment notwithstanding the verdict ("judgment n.o.v.") in this antitrust action. Following a jury trial, appellants were awarded $350,000, which was trebled to $1,050,000 pursuant to 15 U.S.C. § 15. The District Court granted appellees' motion for a judgment n.o.v. on the grounds that appellants presented insufficient evidence for the jury to find an agreement in furtherance of a conspiracy. The court alternatively granted appellees' motion for a new trial. Appellants appeal both of these rulings. Appellees also cross-appeal other various rulings of the court. We find that the District Court did not err in granting appellees' motion for judgment n.o.v. and therefore AFFIRM.

Ottawa Community Improvement Corporation ("CIC") and its members are a nonprofit corporation contractually responsible for reviewing requests for industrial revenue bonds ("I.R.B.'s") on behalf of the Village of Ottawa. Ohio Rev. Code Ann. § 1724.10. CIC has the responsibility of evaluating requests for I.R.B.'s using specific criteria, and I.R.B.'s may not be issued without CIC approval. Appellant Smith is president and sole shareholder of Riverview Investments, Inc., which is a real estate development corporation. Riverview bought over twelve acres of land outside the Village in 1979, part of which was to be developed with the I.R.B.'s that are involved in this appeal.

Appellants entered into an agreement with Chase Shopping Centers, Inc., whereby Chase had the option of purchasing over ten acres of appellants' property to build a shopping center, including a K Mart store. Chase would only purchase the property if CIC approved the sale of I.R.B.'s. A financing firm, Zappalla & Company, Inc., committed itself to purchase up to $1,950,000 in I.R.B.'s once they were issued.

Appellee CIC voted to deny appellants' bond request on April 16, 1980. CIC reconsidered appellants' request on

August 8, 1980, but again rejected it. CIC gave no reason for the denial on either occasion. Failing to get bond approval, the agreement between appellants and Chase was dissolved.

Appellants sued CIC and its members in December, 1981, claiming that appellees violated 42 U.S.C. § 1983 and 15 U.S.C. §§ 1, 2 (Sherman Act).[1] The suit was dismissed on summary judgment, and appellants appealed. This Court affirmed summary judgment on the section 1983 claim, but reversed summary judgment on the antitrust claim. *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 769 F.2d 324 (6th Cir.), *as amended*, 774 F.2d 162 (6th Cir. 1985).[2] It ruled that appellees may be entitled to state immunity under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). *Hallie* gives state immunity if the challenged conduct is done pursuant to a clear state policy to displace competition, and if the state supervises the conduct. This Court found that the first prong of *Hallie* was satisfied, but remanded for the District Court to consider the second prong. The District Court found that CIC was a "private non-municipal party" subject to *Hallie*'s second prong, that its decision in effect denied appellants' I.R.B. application, and that the state did not supervise its decision. The case was tried, appellants claiming that appellees' votes to deny the I.R.B. application amounted to a conspiracy in unreasonable restraint of trade.

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[1]This appeal only involves the § 1 claim, since appellants voluntarily dismissed the § 2 claim at trial.

[2]This Court amended its opinion remanding the case to say "[i]f the District Judge determines that the Community Improvement Corporation made the effective decision [to deny appellant's bond request], then evidence should be taken on whether in rendering its decision the Community Improvement Corporation was actively supervised by the state." 774 F.2d at 163. This modified the earlier opinion which said ". . . was actively supervised by the *Village of Ottawa*."

Appellees moved for judgment n.o.v. or, alternatively, a new trial. The motion for judgment n.o.v. was granted on the grounds that appellants presented insufficient evidence from which the jury could infer appellees entered into a conspiracy. The court also conditionally granted a new trial on the grounds that the verdict was against the weight of the evidence. Appellants appeal the judgment n.o.v. and new trial ruling. Appellees also cross-appeal the District Court's finding that they were not entitled to state immunity.

A. Renewal of Rule 50(b) Motion

Appellants first argue that appellees' motion for judgment n.o.v. was improperly granted because appellees failed to preserve it by renewing their motion for a directed verdict at the close of *all* the evidence. Appellees made a motion for directed verdict after the close of appellants' case-in-chief and again at the close of their own case-in-chief, claiming that appellants failed to put on sufficient evidence from which the jury could find a conspiracy. However, appellants put on a rebuttal witness. Appellees failed to renew their motion for a directed verdict after his testimony, which constituted the end of all the evidence. It is upon this failure to renew that appellants claim appellees waived their right to make a motion for judgment n.o.v.

As a general rule, a party seeking a judgment n.o.v. must, as a prerequisite, move for a directed verdict at the close of all the evidence or renew such motion if made prior to the close of all the evidence. Fed. R. Civ. P. 50(b). This Court has recently ruled, however, that technical deviation from Rule 50(b)'s command is not fatal. *Boynton v. TRW, Inc.*, 858 F.2d 1178 (6th Cir. 1988) noted that "[w]hile '[i]t is certainly the better and safer practice to renew the motion for directed verdict at the close of all the evidence,'

> [t]he application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of

> [its] particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for truth.' "

Id. at 1185 (quoting *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir. 1981)). This Court in *Boynton* further adopted the Fifth Circuit's conclusion that slavish application of the rule would be "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." *Id.* at 1186 (quoting *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)). In avoiding adherence to "slavish nominalism," this Court cited with approval 5A *Moore's Federal Practice Digest* § 50.08 (2d ed. 1984), which says that

> a motion for judgment notwithstanding may be granted despite the party's failure to renew his motion for a directed verdict where: (1) The court indicated that the renewal of the motion would not be necessary to preserve the party's rights; and (2) The evidence following the party's unrenewed motion for a directed verdict was brief and inconsequential.

858 F.2d at 1186. This is in accord with other circuits which have held that upon a movant's failure to renew its motion for a directed verdict at the close of all the evidence, judgment n.o.v. may still be granted "if the evidence introduced after the motion for directed verdict was brief, and the court somehow indicated that renewal of the motion would not be necessary . . . ." *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *see also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825-26 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

In *Boynton*, the defendant made a motion for a directed verdict at the end of the plaintiff's case-in-chief. He failed to renew the motion at the end of all the evidence. After the jury returned its verdict, he moved for a directed verdict,

which was denied. On appeal, this Court held that the defendant's motion for a directed verdict was in effect a motion for judgment n.o.v., and that the failure to renew the motion at the close of the defendant's evidence did not constitute a waiver of his right to move for judgment n.o.v. The Court relied on the fact that the judge indicated, upon defendant's motion for a directed verdict at the close of plaintiff's case, that he intended to let the case go to the jury. The Court also noted that defendant's evidence consisted of the testimony of one person, most of which was duplicative of plaintiff's witnesses. Renewing the motion at the close of all the evidence would therefore serve no useful purpose. 858 F.2d at 1186.

In the present appeal, appellees contend that the District Court indicated to them that the technical requirements of Rule 50(b) were met.[3] This contention is underscored by the

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[3]After appellees rested their case-in-chief, the following dialogue occurred:

The Court: What do you want to do, renew your motion?

Mr. Schnorf: I do.

The Court: It will be overruled, so that will take care of the technicalities.

Mr. Schnorf: I understand.

The Court: All right.

Mr. Schnorf: And the record should indicate that the defendants now rest their case-in-chief.

The Court: I don't know whether you should renew your motion after you rest but any way—

Mr. Schnorf: I understand.

The Court: Just to protect the record.

District Court's explicit finding that it informed appellees that renewal of their motion for directed verdict would not be necessary to comply with the requirements of Rule 50(b). Moreover, the District Court also found that the testimony obtained by appellants after the motion for a directed verdict was brief. Appellants' rebuttal evidence consisted of Mr. Smith's testimony regarding the identities of the borrower and the obliger involved in the transaction, the effects the rejection of I.R.B.'s had on appellants' business, and other minor issues. We agree that this testimony was brief and of little consequence to the outcome of the trial.

We conclude that because the District Court indicated to appellees that renewal of their motion for a directed verdict was not necessary to preserve their right to move for judgment n.o.v., and because Smith's rebuttal testimony was brief and inconsequential, appellees' failure to renew its motion for a directed verdict at the end of the rebuttal testimony did not preclude the District Court from granting judgment n.o.v.

B. State Action Immunity

Before considering the propriety of granting judgment n.o.v., we must consider appellees' state action immunity defense. CIC's defense, raised by way of its cross-appeal, is that it is entitled to immunity under *Hallie*, 471 U.S. at 34 because of its status as a public entity. *Hallie* grants state action immunity from Sherman Act liability if either (1) the entity performing the alleged conduct in restraint of trade is private, but supervised by the state, or (2) if it is a municipality or agent of a municipality. *See Consolidated Television Cable Serv. Inc. v. City of Frankfort*, 857 F.2d 354 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1537 (1989). In a previous appeal in the present suit, this Court remanded to the District Court for a determination of:

> (1) Whether the Village of Ottawa or the Ottawa Community Improvement Corporation made the

> effective decision to reject appellants' bond application. If the District Judge concludes that the Village of Ottawa did, the order denying relief should be reentered. (2) If the District Judge determines that the Community Improvement Corporation made the effective decision, then evidence should be taken on whether in rendering its decision the Community Improvement Corporation was actively supervised by the state.

Riverview Investments, 769 F.2d at 330. Upon remand, the District Court found that "CIC was not considered by the State as a municipality or agency of a municipality, but simply as a body of people organized for the purpose of economic development." It also found that CIC was "separate from the Village and [was] not a government body." The court concluded as a matter of law that "CIC [was] a private, non-municipal party," and its decision denying appellants' application was not supervised by the state.

In its cross-appeal, appellees challenge these conclusions, claiming that the court should have found that CIC was a municipal agent entitled to state immunity. Upon review of the record and consideration of the relevant precedents, we agree with the District Court.

Hallie held that a municipality is subject to state action immunity if it acts pursuant to a clearly articulated state policy, regardless of whether its actions are supervised by the state. If the actor is private, however, active state supervision is necessary to claim immunity. This is so because

> [w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. When the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement.

471 U.S. at 47 (emphasis in original). Appellees claim that the District Court erred in determining that CIC was a private entity and cite several cases to support this position. However, each case is distinguishable from the facts of this appeal. In *Consolidated TV,* this Court held as a matter of law that Community Services, Inc., a non-profit, non-stock corporation, was a public entity. In *Consolidated TV,* Community Services was created by the Electric and Water Plant Board of the City of Frankfort, Kentucky to operate, pursuant to a contract between Community Services and the board, a cable TV network owned by the City. Consolidated TV sought the Board's permission to extend its cable service into areas served by Community Services. It was denied three times, and Consolidated sued under section 1 of the Sherman Act.

This Court found in favor of Consolidated's claim of state action immunity, relying on the undisputed facts that (1) the Board (and by extension, the municipality) created Community Services, (2) Community Services' structure and operation was determined by the City through the Board, (3) Community Services existed at the pleasure of the Board, and the City appointed one-half of Community Services officers, and (4) contracts between the Board and Community Services said that the Board "is the owner, and has ultimate control, of the television cable system." The Court said from these facts that "it is clear that the Board has ultimate control of community, and that Community is a municipal agent and should be treated as such for purposes of the doctrine of state action . . . ." 857 F.2d at 358-59.

Each of the factors leading to the court's conclusion in *Consolidated TV* is absent here. First, CIC was not created by the city or an organ of the city. Rather, "[t]he incorporation and organization of CIC, the selection of its members and the initial actions of CIC occurred before [the] Village Council became involved in [the] activities of the Corporation." Moreover, CIC was solely incorporated by

Frances F. Goins, without any mention of the municipality appearing in the articles of incorporation or in the corporate regulations. Second, CIC's structure and operation were not determined by the Village. To the contrary, "CIC controlled its own internal activities in accordance with the provisions of its articles of incorporation and code of regulations." *Id.* The regulations also reserved to the CIC exclusive rights to amend the regulations without further approval of the Village.

Third, although the Village had plenary control over CIC to the extent that it could terminate its existence by passing an ordinance, the Village had no right to appoint CIC members as the Board did in *Consolidated TV.* Ohio Rev. Code Ann. § 1724.10 requires that only two-fifths of CIC members be elected or appointed officials. CIC made all appointments without involvement of the Village. Further, despite the fact that the Village could terminate CIC's existence through an ordinance, such power does not constitute "control" of the kind found in *Consolidated TV.* The power to terminate an organization is not tantamount to power to control the decisions made by that organization, especially in light of the fact that the Village in this case appeared totally disinterested in the decisions by the CIC. The abstract, theoretical *power* to terminate CIC's existence is not a sufficient indication that CIC was *controlled* by the Village. The facts that caused this Court in *Consolidated TV* to find that Community Services was a municipal agent entitled to state immunity under *Hallie* do not exist here.

Appellees also cite *Ambulance Service of Reno, Inc. v. Nevada Ambulance Service, Inc.*, 819 F.2d 910 (9th Cir. 1987). In that case, the defendant Regional Emergency Medical Services Authority ("REMSA") was a charitable corporation incorporated at the direction of the Washoe County District Board of Health. REMSA had the authority to grant or deny applications for ambulance service franchises. The plaintiff sued under section 1 of the Sherman Act when

REMSA denied its application. The court held that REMSA was a public organization immune under *Hallie* because it was not pursuing its own economic interests. This case is also distinguishable from the instant appeal. The District Board of Health had significant involvement with the operation of REMSA, including the right to set rates and charges and to control the training and orientation of its personnel. Operational information had to be given to the Board monthly so it could closely monitor its activities, and in the event of default by REMSA, all equipment and contractual rights reverted to the Board. These were the facts that caused the Ninth Circuit to "treat REMSA as the instrument of the 'municipality' in the *Hallie* sense, and hold that active supervision by the State of Nevada [was] not required." *Id.* at 913. Such involvement and control of CIC by the village is absent, as discussed above.

The remaining cases appellees cite are similarly inapposite. *Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886 (9th Cir.), *cert. denied,* 109 S. Ct. 489 (1988) found state immunity, but did not analyze whether the defendant redevelopment agency was a public or a private entity. In *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority,* 801 F.2d 1286 (11th Cir. 1986), the defendant aviation authority was held immune from suit because it "was created by the Florida legislature to develop and administer public airports in the Tampa, Florida region. The Authority [was] a government arm of the State . . . ." *Id.* at 1288. CIC, by contrast, was created without the involvement of the state or the Village and was not considered an arm of the state.

Appellees also cite *Cine 42nd Street Theater Corp. v. Nederlander Organization, Inc.,* 790 F.2d 1032 (2d Cir. 1986). Dissimilarities between that case and the present appeal abound. In *Cine,* New York's Urban Development Corporation was given state action immunity in a Sherman Act suit. However, it differed significantly from the CIC. First, it was a

"corporate, governmental agency of the state, constituting a political subdivision and public benefit corporation." *Id.* at 1035. CIC is not. *See* Op. Atty. Gen. No. 87-024 (1987) ("A community improvement corporation, organized pursuant to RC Chapter 1724 is not a 'political subdivision' as that term is defined in RC § 2744.01(F)").[4] Two of New York's Urban Development Corporation's nine members were public officials, while the rest were designated by the governor and approved by the state senate. *Id.* at 1036. CIC appointed its own members with no input from the state or local government. Moreover, "[a]lthough a creature of statute, the [Urban Development Corporation] derives its powers directly from the State Constitution" and "exercises governmental authority." *Id.* This is not the case with CIC, which is free to act according to its own corporate regulations without oversight by the state. Thus, *Cine* is not persuasive authority for the assertion that CIC is a public entity.

None of these cases are similar enough for us to conclude that the District Court erred in holding that CIC was not a public entity. We agree with its decision that CIC, being independent and beyond the direct control of the Village, and ...corporated without Village involvement, was a private actor not entitled to state action immunity.

The Ohio Attorney General, as amicus, argues a slightly different position. He admits that CIC is not a "public subdivision," but contends that it is not a purely private actor either. It is rather a hybrid entity, a fusion of private structure and organization with public functions and interests. Although *Hallie* articulated the different requirements neces-

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[4]The court's holding that the Development Corporation was entitled to state immunity is founded on its status as a political subdivision of the state. "The [Urban Development Corporation], like a municipality, is by statute a political subdivision of the state. . . . Therefore its interests must be defined as public rather than private . . . ." 790 F.2d at 1047.

sary for a public or private entity to claim immunity, it did not provide a test for categorizing an entity as public or private. The Attorney General urges that we apply a functional analysis in deciding whether *Hallie* state action immunity should apply when it is not clear whether the actor is public or private. We need not rule on the wisdom of this test, since the District Court's conclusions are supported even if analyzed under the Attorney General's suggestion framework.

The Attorney General's position is based on *Hallie*'s premise that state immunity should be given to an actor if that actor is pursuing a policy in furtherance of a state interest. For private actors, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." 471 U.S. at 46. When the actor is a municipality, there is no need to show supervision because it is presumed to be acting in the public interest. *Id.* at 47. Because *Hallie*'s grant of immunity is predicated on the fact that the actor's alleged anticompetitive conduct is done pursuant to state policy, the Attorney General argues that the public/private distinction is less a matter of rigid, nominal *classification* than it is a matter of identifying the actor's *function*. If the entity is found to be behaving as a public entity pursuing public interests, it should be afforded immunity; if it is pursuing predominantly private interests, it should not be. The Attorney General maintains that active state supervision is but one way of ensuring conduct is pursuant to state policy. He argues that several factors require a finding that CIC acted pursuant to state policy, thus entitling CIC to *Hallie* immunity. For the reasons outlined below, we reject this conclusion.

Amicus first argues that in a prior decision in this case, this Court held that CIC acted pursuant to state policy in denying appellant's bond application. While this is true, it does not indicate that CIC was performing a government function. More importantly, however, to claim immunity

CIC must have been *actively supervised by the state* (assuming it was not a public entity), rather than merely acting pursuant to state policy. Amicus also argues CIC meetings were subject to public scrutiny under the Sunshine Act. However, there was no public *control* over those meetings, and CIC's decisions were made exclusively by that organization according to its corporate regulations. Even the election of new members was done without public participation. Allowing public attendance at the meeting of an otherwise private organization does not transform it into a public entity.

Amicus also argues that CIC was the agent of the Village. Although CIC approved of bonds on behalf of the Village, and therefore acted as its "agent," this argument ignores the reality that CIC was an independent body, making independent decisions without the input, advice, involvement, or oversight of the Village or any other governmental body. The District Court found that the "Village of Ottawa does not review or amend a decision of CIC rejecting a request for industrial revenue bonds." Appellees do not challenge this finding, and it is not clearly erroneous. Nor do appellees challenge the court's factual finding that "CIC was not considered by the State as a municipality or agency of a municipality, but simply as a body of people organized for the purpose of economic development."

The Attorney General next argues that because 40% of the governing board was required to be elected or appointed officials, there was a "most powerful check" that CIC was used for state purposes. As discussed above, although CIC was required to have 40% public officials on its governing board, it was free to appoint people of its choosing. The presence of public officials does not indicate public control, especially when 60% are not public officials.[5]

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[5]Note that this is different from *Cine 42nd Street Theater Corp.*, where two of New York's Urban Development Corporation's nine members were required to be public officials. In that case, where the court held the Corporation to be a public entity, the other members were appointed by the governor and approved by the senate. Thus, all members of that group were placed with government oversight.

Amicus next claims there is general state oversight of CIC, even if there is no active state supervision, because the articles of incorporation must be approved by the Attorney General, the Department of Development must annually review CIC's reports, the Secretary of State can cancel the articles of incorporation, and the common pleas court can oversee dissolution of CIC. These arguments are without merit. Approval of the articles of incorporation by the Attorney General does not make the entity public. All private corporations under Ohio law must file their articles of incorporation with the Secretary of State, Ohio Rev. Code Ann. § 1701.04, and the articles must be approved by the Secretary. Ohio Rev. Code Ann. § 1701.08. If the Attorney General's logic were followed, *all* corporations would become public entities because they must all be officially approved by the state. Similarly, the argument that the court of common pleas can oversee dissolution of CIC is meritless, since that court has authority to oversee the dissolution of all corporations. Ohio Rev. Code Ann. § 1701.91. Finally, annual review of CIC reports does not indicate CIC's public nature. Ohio Rev. Code Ann. § 1785.06 requires the filing of annual reports by all private professional corporations with the Secretary of State, and failure to do so results in cancellation of the articles by the Secretary. None of the factors amicus points to indicate that CIC was "public," since the factors apply with equal force to private corporations as well.

Amicus finally argues that Chapter 1724 constrains CIC's actions by requiring it to act consistently with a plan approved by the political subdivision. However, appellees do not contest that CIC is free to act independently of the Village and according to its own articles and regulations. Acting within the legislative parameters of section 1724 and the plan approved by the subdivision does not evidence a public function.

On remand from the previous judgment of this Court, the District Court considered the question whether CIC was a

public or private entity. It determined that it was private and therefore not entitled to immunity. Its finding was supported by the record and the relevant case law. Its judgment should not be disturbed.

C. Propriety of Granting Judgment Notwithstanding the Verdict

Having determined that appellees are not entitled to state action immunity under *Hallie*, we next address whether judgment notwithstanding the verdict was appropriately granted. Our standard of review is to view the evidence "in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor." *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The motion is appropriately granted if we are of the opinion that the evidence so favors the movant that "reasonable minds could not come to a different conclusion." *Id.* at 1105. *See also Gillham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976).

The Supreme Court has limited the inferences that can be drawn from ambiguous evidence in Sherman Act section 1 cases. In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), the Court established guidelines for determining when an agreement to conspire under section 1 can be inferred. *Monsanto* requires a plaintiff to present evidence which "tends to exclude the possibility" that the alleged conspirators were acting independently, rather than in concert pursuant to an agreement. *Id.* at 764. In *Monsanto*, an agricultural products manufacturer terminated one of its dealers who sold products at a price lower than other dealers. The terminated dealer sued under section 1, claiming that the manufacturer and distributors had an agreement to set prices. As evidence of this claim, the plaintiff proffered complaints made to the manufacturer by other

distributors that the terminated dealer was setting prices too low. The Court noted that these complaints could have stemmed from the dealers' independent business interests, rather than from an agreement. However, the Court found there was also evidence tending to exclude the possibility of independent action, including testimony that the manufacturer told the distributor that if it did not maintain the suggested retail price, it would not receive adequate amounts of certain chemicals. There was also a newsletter suggesting that the manufacturer would terminate distributors that did not honor its pricing. This evidence was sufficient to create a jury question as to the existence of a conspiratorial agreement.

Matsushita held that a section 1 plaintiff must "show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action" if the plaintiff relies on ambiguous evidence. 475 U.S. at 588. A fact finder may not infer a conspiracy if there is no economic motive to conspire and there is a nonconspiratorial explanation for the alleged conspiratorial conduct. As the District Court noted, *Monsanto* and *Matsushita* together establish

> a two-part inquiry for evaluating the propriety of summary judgment in an antitrust conspiracy case: (1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987). A plaintiff thus fails to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action. *See Matsushita*, 475 U.S. at 588 ("conduct as consistent with per-

missible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").

Appellants do not dispute the District Court's statement of law. They argue, however, that it misapplied the law to the facts of this case. Upon reviewing the evidence that appellants claim supports the jury's finding, we conclude that the District Court did not err in granting judgment n.o.v.

In marshalling evidence that "tends to exclude the possibility of independent action," appellants first claim that CIC members had a pecuniary interest in preserving downtown businesses and protecting them from competition. Appellants argue this indicates concert of action. However, only appellee Edelbrock owned a store that would compete directly with appellants' proposed development. Appellee Beckman owned a jewelry store, but the record reveals no evidence that appellants' development project would compete with it. A third appellee owned an interest in a downtown store through a corporation. No other CIC members had any personal business interest in the downtown area. Appellants also argue that CIC members were friends of downtown businessmen and that some CIC members committed themselves to protecting existing businesses from competition. According to appellants, this establishes a motive to conspire. It does not, however, tend to exclude the possibility that appellees acted independently, which is appellants' burden. Indeed, having a business interest in the community makes it more likely that they voted out of their own individual self-interest to preserve the status quo than voting pursuant to a conspiracy with other CIC members. Each of the three members had an economic motive to deny the I.R.B.'s regardless of any agreement with other CIC members. The effect of their business interests is thus highly ambiguous—it evidences individual motivation to deny the I.R.B.'s as much as it evidences any kind of conspiratorial conduct. Even if we were to agree that it establishes a motive to conspire, appellees' conduct is just

as consistent with independent action. C.I.C. members made their decision to approve or deny I.R.B.'s based on specific criteria,[6] one point of which was any new development's impact on the local economy.[7] Although appellees could identify no specific business that would be injured by appellants' development project, their denial of I.R.B.'s based on their concern for downtown business was, as the District Court held, "as consistent with independent conduct as with a conspiracy." In sum, the presence of a motive to conspire based either on personal pecuniary interests of CIC members or commitments made to local businessmen to protect them

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[6]The criteria are:

1. Creates and preserves jobs and employment opportunities in the Municipality and the State of Ohio.

2. Improves the economic welfare of the people of the Municipality and of the State of Ohio.

3. Encourages and causes the maintenance, location, relocation, expansion, modernization and equipment of sites, buildings, structures and appurtenant facilities for industrial, commercial distribution and research activities within the Municipality and thereby preserves, maintains or creates additional opportunities for employment within the Municipality.

4. Maintains and increases the tax valuation of property within the Municipality in order that tax revenues may be available to provide services for the preservation of public peace, health, safety and general welfare of the Municipality.

5. Is consistent with social, economic and geographic factors present in the Municipality.

6. Is not inconsistent with job needs and skills present in the Municipality.

7. Is not inconsistent with environmental factors present in the Municipality.

8. Is in accordance with its applicable planning and zoning.

[7]Appellants argue that CIC could not consider the impact on any single entity such as the downtown area. However, the criteria does allow the CIC to consider the impact of new development on the entire municipal area, which includes downtown.

from competition does not "tend to exclude the possibility of independent action" as required by *Monsanto.*

Appellants also argue the District Court erred when it stated that discussions between CIC members and local businessmen did not "conclusively establish that defendants entered into an illegal conspiracy." Appellants claim the court erroneously required them to "conclusively" prove a conspiracy, rather than to merely show evidence tending to exclude the possibility of independent action. This argument misapprehends the District Court's statement when read in context. It is clear from the District Court's opinion that, despite use of the word "conclusively" in discussing appellants' evidence, it applied the correct test. In examining the same evidence, we find that merely discussing I.R.B.'s with local businessmen does not tend to exclude the possibility that CIC members acted independently in denying the I.R.B.'s. There is nothing unusual about informal contacts between CIC members and local businessmen. In fact, appellant Smith talked to CIC members himself to solicit votes in favor of his I.R.B.'s. Discussions with local businessmen do not tend to establish that appellees did not act independently.

The other arguments appellants rely on to show there was an adequate basis for the jury to find a conspiracy are even less compelling. Appellants claim that there was no evidence of independent action, that there was evidence of parallelism, that appellees had the opportunity to conspire, and that appellees' actions were consistent with a conspiracy to block competition. These arguments, however, misconstrue appellants' burden in proving the existence of a conspiracy under section 1. None of these arguments, even if accepted as true, tend to exclude the possibility of independent action. All may be *consistent* with conspiratorial conduct but, as noted throughout this opinion, proving that conduct is consistent with a conspiracy is not sufficient to allow an inference of conspiracy absent some evidence which tends to exclude the possibility that conduct is independent. We conclude that the

evidence appellants relied upon at trial to establish a conspiracy was ambiguous, establishing conduct that was as consistent with independent action as with a conspiracy. Since appellants failed to provide any evidence tending to exclude the possibility that the alleged conspiratorial conduct was in fact the result of independent action, the jury was not entitled to infer the existence of a conspiracy.

For the foregoing reasons, we AFFIRM the District Court's grant of judgment n.o.v. for appellee CIC.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C 81-774

Riverview Investments, Inc., et al.,
Plaintiffs

vs.

Ottawa Community Improvement Corp., et al.,
Defendants

MEMORANDUM AND ORDER
(Filed April 13, 1988)

POTTER, J.:

On November 2, 1987, the Court conducted a hearing on defendants' motion for judgment notwithstanding the verdict (judgment nov) or, in the alternative, for a new trial. The parties have extensively briefed this matter. Defendants filed a timely motion, plaintiffs filed opposition, then with leave of court defendants filed a supplemental memorandum, and plaintiffs filed a reply to defendants' supplemental memorandum. Also, before the Court is plaintiffs' application for attorney's fees and costs, defendants' opposition and plaintiffs' reply.

In this proceeding plaintiffs maintained that defendants violated Section 1 of the Sherman Act by voting to deny industrial revenue bonds (IRBs) for the financing of a K-Mart store on property owned by Riverview Investment, Inc.

The matter was instituted on December 12, 1983. On March 1, 1984, the Magistrate issued a Report and Recommendation recommending that defendants' motion for summary judgment be granted. After the parties had filed objections and responses to the objections, this Court adopted the Magistrate's Report and Recommendation. Thereafter, plain-

tiffs filed an appeal to the Sixth Circuit Court of Appeals. On July 31, 1985, the Court of Appeals affirmed in part, reversed in part and remanded the proceedings to this Court. Pursuant to the court of appeals mandate, this Court held an evidentiary hearing on the issue of state action immunity under the Sherman Act. On February 10, 1987, this matter was tried to a jury. The jury returned a verdict in favor of plaintiffs in the amount of $350,000.00. On February 20, 1987, the Court trebled the award and entered judgment against the defendants in the amount of $1,050,000.00.

At each stage of this proceeding, most notably at the post-trial stage, the parties have significantly altered their position. Because of the fluctuations in the parties' positions, defendants' post-trial motions present issues not presented at trial, issues not preserved at trial and issues contrary to the position taken by defendants at trial.

Pursuant to Fed. R. Civ. P. 50(b), defendants seek judgment nov. The rule provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment enetered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judg-

> ment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict has been directed.

Fed. R. Civ. P. 50(b). In deciding a motion for judgment nov, the Court must determine whether there is sufficient evidence to raise a question of fact for the jury. *Morelock* v. *NCR Corp.*, 586 F.2d 1096, 1104 (6th Cir. 1973), *cert. denied*, 441 U.S. 906 (1979). The Court may not weigh the evidence, resolve issues of credibility or substitute its judgment for that of the jury. *Id.* Therefore, the evidence must be viewed in the light most favorable to the party against whom the motion is made. *Gillham* v. *Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). If the Court determines that reasonable minds could not differ on the conclusion to be drawn from the evidence, then the Court should grant the motion. *Morelock*, 586 F.2d at 1104-05; *Gillham*, 523 F.2d at 109.

A court may not grant a motion for judgment nov unless the moving party formally renewed their motion for directed verdict at the close of all the evidence. *Mallick* v. *International Brotherhood of Electric Workers*, 644 F.2d 228, 233 (3d Cir. 1981); 5A Moore's Federal Practice ¶ 50.08 at 50-74 (2d ed. 1980). When a movant does not renew its motion for directed verdict at the close of all the evidence, a court may entertain a motion for judgment nov "if the evidence introduced after the motion for directed verdict was brief and the court somehow indicated that renewal of the motion would not be necessary. . . ." *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); see also *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821, 925-26 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). In the present proceeding, the Court determines that plaintiffs' rebuttal evidence was brief. Further, when defendant renewed their motion for directed verdict at the close of the case, the Court did indicate that defendants had satisfied the technical requirements of Fed. R. Civ. P. 50. Trial transcript at 598-99 (Tr.).

However, a motion for judgment nov permits the trial court to re-examine its decision not to direct a verdict as a matter of law. *Ohio-Sealy*, 585 F.2d at 825. Since a motion for judgment nov is technically only a renewal of a motion for directed verdict, the parties may only assert as gounds for judgment nov the issues presented in their motion for directed verdict. *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 815 (3d Cir. 1984); *cert. denied*, 477 U.S. 908 (1986); *Lowe* v. *Conlee*, 742 F.2d 1140, 1141 (8th Cir. 1984); *Sulmeyer* v. *Coca Cola Co.*, 515 F.2d 835, 846 (5th Cir. 1975), *cert. denied*, 424 U.S. 984 (1976). If an issue was not raised in their motion for directed verdict, the Court may not consider this issue in a motion for judgment nov. *Bonjorno*, 752 F.2d at 851. Further, a court should not grant a motion for post-trial relief when the losing party raises a new theory which could have been raised during the original proceedings. *CBS Meats Industry, Ltd.* v. *Kress Dobkin Co., Inc.*, 474 F. Supp. 1357, 1361 (W.D. 1979), *aff'd.* 622 F.2d 573 (3d Cir. 1980).

A party must bring a motion for judgment nov and a motion for new trial within the prescribed period of ten days in order to be timely. *Bass* v. *Spitz*, 522 F. Supp. 1343, 1346 (E.D. Mich. 1991). If the motion is not made within the prescribed period, the court does not have the power to grant the relief requested. *Philhall Corp.* v. *United States*, 546 F.2d 210, 213 (6th Cir. 1976). A court may not grant a post-trial motion for reasons advanced after the expiration of the mandatory ten day period. *CBS Meats*, 474 F. Supp. at 1360. If a party is granted leave to file a supplemental brief in support of its post-trial motion, the moving party is not entitled to raise additional issues in the supplemental brief thereby negating the ten day mandatory time limitation for post-trial briefs. *Bucantis* v. *Midland-Ross Corp.*, 81 F.R.D. 623 (E.D. Pa. 1979).

After plaintiffs had presented their case-in-chief, defendants made a motion for directed verdict. The issue raised in this motion was initially that the evidence of conspiracy was insufficient. In rebuttal, defendants raised additional issues

regarding the existence of an option and not a contract to purchase the land, the availability of alternative means of financing, and that because differing opinions existed regarding the benefit to the community from plaintiffs' development project, the rule of reason was not violated. Although defendants did file a timely motion for judgment nov, all the issues raised in the original motion were not raised in the motion for directed verdict. Furthermore, defendants attempted to raise issues not raised in the directed verdict or the original judgment nov in their supplemental brief. Finally, defendants took contrary positions at trial to the theories presented by defendants' new counsel.[1] *United States* v. *72.71 Acres More or Less Situate in Montgomery County*, 157 F. Supp. 401, 40 (D. Md. 1957), *aff'd*, 256 F.2d 669 (4th Cir. 1953), *cert. denied*, 273 U.S. 416 (1960). This is completely contrary to the established law. Therefore, this Court will only consider issues properly presented at trial and will not consider issues raised for the first time in defendants' post-trial motion or not raised within the mandatory prescribed time.[2]

Since defendants properly preserved the issue of insufficiency of the evidence to establish a conspiracy, the Court will consider this issue. Plaintiffs' maintain that a conspiracy was established by (1) defendants' identical reason for denying the bond application, (2) defendants met among themselves outside of the CIC meetings, (3) defendants were pressured by local businessmen to deny the application, (4) Louis Mackey adknowledged downtown businessmen's fear of competition from a shopping center, (5) defendants' answers were affected by a lack of memory on certain issues.

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[1] At trial defendants' counsel argued plaintiffs must show that defendants conspired among themselves to establish a conspiracy. In the supplemental post-trial brief defendants' new counsel attempted to establish the inability of defendants, as a single entity, to conspire among themselves.

[2] The issues raised for the first time in defendants' supplemental motion are single entity conspiracy, failure to establish unreasonable restraint of trade in relevant market, standing of Smith, immunity pursuant to 13 U.S.C. § 34-36 and qualified immunity. The Court will not consider these issues in deciding the motion for judgment nov.

In two recent Supreme Court cases the Court explicitly determined that the antitrust laws limit the range of permissible inferences from ambiguous evidence in a 15 U.S.C. § 1 case. *Matsushita Electric Industrial Co., Ltd.* v. *Zenith Radio Corporation*, 475 U.S. 574, 588 (1986); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Lack of motive bears on the range of permissible conclusions that may be drawn from ambiguous evidence. *Matsushita*, 475 U.S. at 596. In *Monsanto*, the court determined that plaintiffs' must present "direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 763. "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588. Accordingly, to survive a directed verdict, a plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirator acted independently." *Id.* (quoting *Monsanto*, 465 U.S. at 764).

Monsanto and *Matsushita* established a two part inquiry for evaluating the existence of a conspiracy: (1) is the plaintiff's evidence of conspiracy ambiguous, i.e., is the evidence consistent with the alleged conspirators' permissible independent interests as with an illegal conspiracy and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing their independent interests. *Gibson* v. *Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987); *Helicopter Support Systems, Inc.* v. *Hughes Helicopter, Inc.*, 813 F.2d 1530, 1534 (11th Cir. 1987). If plaintiff's ambiguous evidence establishes an inference of conspiracy which is less probable or equal to an inference of independent action, the plaintiffs have not established a conspiracy under 15 U.S.C. § 1. *Wilcox* v. *First Interstate Bank of Oregon*, 815 F.2d 522, 525 (9th Cir. 1987).

Plaintiffs rely on "plus factors" to establish a conspiracy under 15 U.S.C. § 1. *Wilcox*, 815 F.2d at 525. Plaintiffs maintain that since each member of the CIC voted against

the issuance of IRB's, defendants' parallel action circumstantially established a conspiracy. *Id.* at 525-26. Defendants do not deny that each member voted against issuance of the IRB's. However, defendants maintain that this conduct was consistent with the criteria of the plan. Defendants maintain that they were concerned for downtown. Although plaintiffs' witnesses testified that the CIC members could not consider a single entity such as downtown, the criteria considered by the CIC did allow the CIC to consider the impact on the entire municipality which includes the downtown area. Furthermore, on cross-examination plaintiffs' witness did testify that the CIC members could consider evidence regarding the enhancement or impact of employment in the municipality. Tr. at 33. Therefore, although the members present similar reasons for denying the IRB application, their concerns were as consistent with independent conduct as with a conspiracy.

Plaintiffs also maintain that the CIC members talked to area businessmen and the CIC members met outside the CIC meetings at local coffee shops. Although the CIC members did have an opportunity to discuss village affairs outside of the meeting and did talk to area businessmen, those facts do not conclusively establish that defendants entered into an illegal conspiracy.

Since plaintiffs attempted to circumstantially establish a conspiracy by presenting ambiguous evidence, plaintiffs must present evidence excluding the possibility that defendants were pursuing independent interests. Therefore, plaintiffs must present evidence from which a reasonable inference of conspiracy is more probable than an inference of independent interests. *Wilcox*, 815 F.2d at 825. In reviewing the record, this Court is aware of its tasks. The Court cannot weigh the evidence, evaluate the credibility of the witnesses or reach a result it finds more reasonable so long as the verdict is supported by sufficient evidence. Construing all reasonable, permissible inferences under 15 U.S.C. § 1 in favor of plaintiffs, this Court determines that plaintiffs did not present sufficient evidence excluding the possibility that these defendants were pursuing independent interests. Therefore, since reasonable

minds could differ on the conclusion to be drawn from the evidence, defendants' motion for judgment nov is well taken.

Pursuant to Fed. R. Civ. P. 50(c), the Court must rule on defendants' motion for a new trial. Unlike a motion for judgment nov a court may compare the opposing proofs and weigh the evidence in ruling on a motion for a new trial. *Bruner* v. *Dunaway*, 584 F.2d 422, 425 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983). The Court has a duty to set a verdict aside if the verdict is against the weight of the evidence. *Duncan* v. *Duncan*, 377 F.2d 49, 52 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967). The district court is afforded broad discretion in ruling on a motion for new trial. *Bruner*, 684 F.2d at 425; *National Polymer Products, Inc.* v. *Borg-Warner Corp.*, 660 F.2d 171, 178 (6th Cir. 1981). In the exercise of the court's discretion, the court must not disturb the jury's verdict "if it is one which could reasonably have been reached." *Bruner*, 684 F.2d at 425. Since this Court has already determined that plaintiffs did not present sufficient evidence to establish a conspiracy, the Court conditionally determines that defendants' motion for new trial is well taken.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendants' motion for judgment nov be, and hereby is, GRANTED; and it is

FURTHER ORDERED that defendants' motion for new trial be, and hereby is, conditionally granted pursuant to Fed. R. Civ. P. 50(c); and it is

FURTHER ORDERED that the judgment entered in favor of plaintiffs and against defendants be, and hereby is, VACATED and judgment is entered in favor of defendants and against plaintiffs; and it is

FURTHER ORDERED that plaintiff's application for attorney's fees be, and hereby is, DENIED.

/s/ JOHN W. POTTER
United States District Judge